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October 1, 1986

Since 1973 the Office of the Attorney General has set forth guidelines concerning the State's Right-to-Know Law, RSA Chapter 91-A. Over the years, my predecessors have updated our Right-to-Know Memorandum, explaining changes that have been made by the Legislature and interpretations of the law by the courts.

As there have been significant changes in the Right-to-Know Law since 1980 when our memorandum was last completely rewritten, I am pleased to make available this 1986 edition of the Attorney General's Right-to-Know Law Memorandum.

As Attorney General, I am committed to the very important principles set out in the preamble to the Right-to-Know Law:

> Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people. RSA 91-A:1.

My office will continue to be available to members of the Legislature, state and local officials, the media and the public, to help assure that the law's important goal of openness in government is met.

Sincerely,

Stephen E. Merrill

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Attorney General

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RIGHT TO KNOW MEMORANDUM

In 1983 and in 1986, the provisions of the Right-to-Know Law were amended in a number of specific respects. In addition, recent decisions of the New Hampshire Supreme Court provide additional guidance in their interpretation. This 1986 compilation updates the Attorney General's Right-to-Know Law Memorandum to 1986. The 1986 amendments are effective on January 1, 1987.

I. WHICH GOVERNMENTAL BODIES ARE SUBJECT TO THE RIGHT-TO-KNOW LAW?

The Right-to-Know Law establishes certain procedures to be followed by governmental bodies in the conduct of their affairs and certain rights of access by members of the general public to two important aspects of those bodies--their meetings and records. In determining the applicable procedure for the meetings of such bodies and in evaluating any request, the initial inquiry must be whether the body involved is subject to the Right-to-Know Law.

A. IF THE GOVERNMENTAL BODY IS LISTED BELOW OR FALLS WITHIN ONE OF THE DESCRIPTIVE CATEGORIES SET FORTH BELOW, THE RIGHT-TO-KNOW LAW APPLIES:

1. STATE:

a. The General Court including executive sessions of committees. RSA 91-A:1-a,II

b. The Governor's Council. RSA 91-A:1-a,II

c. Boards and commissions of State agencies or authorities, including the Board of Trustees of the University System of New Hampshire. RSA 91-A:1-a,III

d. All State executive branch agencies and departments. Lodge v. Knowlton, 118 N.H. 574 (1978); "Open Meetings: Types of Bodies Covered," National Association of Attorneys General (June 1979).

e. Although the Right-to-Know Law does not specifically include committees of State boards, commissions, councils, and the General Court, the case law suggests that they are covered. Bradbury v. Shaw, 116 N.H. 388 (1976).

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f. It should be noted that a board or committee need not be formally established by statute or ordinance for it to fall within the provisions of the Right-to-Know Law. Bradbury v. Shaw, 116 N.H. 388 (1976).

g. Several state statutes create bodies corporate and politic, such as RSA 162-A:3 (Industrial Development Authority). While some of these statutes specifically designate such entities as agencies of the State, others do not. Whether such entities are public bodies subject to the Right-to-Know Law will depend on the extent to which they perform governmental functions and the nature of their relation to the State. See Northern New Hampshire Lumber Co. v. New Hampshire Water Resources Board, 56 F.Supp. 177, 180 (D.N.H. 1944).

2. COUNTY AND MUNICIPAL:

Boards, commissions, agencies, or authorities, committees, subcommittees, subordinate bodies or advisory committees of all political subdivisions of the State including but not limited to counties, towns, municipal corporations, village districts, and school districts. RSA 91-A:1-a, IV; e.g., Municipal Finance Committee: Selkowe v. Bean, 109 N.H. 247 (1968).

II. MEETINGS

If the governmental body is one of those included above, the Right-to-Know Law imposes certain procedural requirements with respect to its meeting.

A. WHEN DOES A PUBLIC BODY HOLD A MEETING?

1. A public body holds a meeting under the Right-to-Know Law when two criteria are met:

a. A quorum of the membership of the public body is convened; and

b. The purpose of the meeting is to discuss or act upon a matter or matters over which the

public body has supervision, control, jurisdiction or advisory power. RSA 91-A:2

2. When less than a quorum convenes, there is no meeting within the meaning of the Right-to-Know Law unless the group is a committee of the larger body. In that case the Right-to-Know Law applies if a quorum of the subcommittee has convened. If members of the public body constituting less than a quorum are joined by an additional member thereby creating a quorum, the Right-to-Know Law and its notice and procedural requirements apply.

3. The Right-to-Know Law does not require members of a board or agency who meet socially or informally to publicize notice and hold an open session since such informal gatherings are not official meetings. However, such informal social gatherings may not be used as a means to circumvent the Right-to-Know Law. If official deliberations occur or if a decision is made at such gatherings or if the gatherings occur on a regular basis, a court may determine that they constitute "meetings" under the Right-to-Know Law.

4. Chance or social meetings neither planned nor intended for the purpose of discussing matters relating to official business, and at which no decisions are made, are specifically exempt from the open meeting requirement as of January 1, 1987. Such meetings may not be used to circumvent the spirit of the Right-to-Know Law. RSA 91-A:2,I(a), as amended by Ch. 83:3, Laws 1986.

5. In Chapter 83:3, Laws 1986, effective January 1, 1987, the General Court has excluded from the definition of "meeting" covered by RSA 91-A strategy or negotiations with respect to collective bargaining and consultation with legal counsel. These statutory exclusions are consistent with the holdings of Appeal of Town of Exeter, 126 N.H. 685 (1985) (collective bargaining) and Society for Protection of New Hampshire Forests v. WSPCC, 115 N.H. 192 (1975) (consultation with legal counsel).

B. NOTICE - RSA 91-a:2

Assuming the governmental body is subject to the Right-to-Know Law and intends to convene a meeting within the meaning of the Right-to-Know Law, notice must be given as follows:

1. REGULAR NOTICE

a. Notice of the time and place of any meeting (including executive sessions) must be posted in two appropriate places 24 hours (excluding Sundays and holidays) in advance of the meeting. These should be places where people are likely to see them, such as the location where the checklists or town warrants are posted; or

b. Notice of the time and place of the meeting may be printed in a newspaper of general circulation in the city or town at least 24 hours in advance of the meeting excluding Sundays and holidays.

c. Executive Sessions: Notice of Executive Sessions must be posted in the regular manner. If the body decides to go into executive session during an open meeting, the notice for the open meeting will suffice.

NOTE: The New Hampshire Supreme Court has held that personal notice of the time, place or subject matter of a school board meeting was not required to be afforded to interested parties. The court thus confirmed that the constructive notice of a meeting afforded by posting it in two appropriate places and by printing it in a newspaper of general circulation is sufficient. Brown v. Bedford School Board, 122 N.H. 627 (1982).

2. EMERGENCY PROCEDURE

a. This method of notice may be utilized if the chairman or presiding officer of the public body decides that immediate undelayed action is imperative;

b. Notice shall be made by whatever means are available to inform the public about the meeting. For example, notice may be given over the radio, the body may post notice, and/or may notify by telephone persons known to be interested in the subject matter of the meeting. The nature of the emergency will dictate the type of notice which can be given. In any event, a diligent effort must be made to provide some sort of notice.

c. In the event an emergency meeting is required and the matter before the body is an adversary proceeding, diligent efforts must be made to notify all adversary parties. Whether a meeting may be held and an order issued in the absence of such notification will depend on the circumstances (e.g. nature of emergency) and the power of the body to issue ex parte orders.

d. NOTE: The minutes of the meeting must clearly spell out the need for the emergency meeting.

3. LEGISLATIVE NOTICE:

Notice of committee meetings shall be made in accordance with the Rules of the House of Representatives and the Rules of the Senate, as appropriate.

4. BROADER ACCESS:

Any public body acting by its charter or by rules or guidelines may provide broader public access to meetings or records than the law requires. If such charter provisions, guidelines, or rules of order have been adopted, their provisions shall take precedence over the provisions of the Right-to-Know Law. RSA 91-A:2.

5. EFFECT OF FAILURE TO OBSERVE NOTICE REQUIREMENTS:

Failure to properly notify the public may deprive the body of jurisdiction or result in the meeting being declared invalid, thus nullifying any action taken or decision made therein. Carter v. City of Nashua, 113 N.H. 407 (1973); Stoneman v. Tamworth School District, 114 N.H. 371 (1974). A court may

also grant a continuing injunction, ordering the body or agency to comply with the notification requirements in the future. See Section IV of this memorandum.

C. PROCEDURE AT MEETINGS - RSA 91-A:2

Meetings of bodies subject to the Right-to-Know Law are open to the public unless the body is authorized to hold an executive session.

1. OPEN MEETINGS

a. Any person may attend an open meeting;

b. No vote in an open meeting may be taken by secret ballot except for:

(1) Town meetings and elections

(2) School District meetings and school district elections.

c. Any person may record, film, or videotape an open meeting;

d. MINUTES MUST BE RECORDED and at a minimum must include:

(1) names of members present

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[1] The importance of keeping minutes which accurately record the proceedings before the public body is reflected in RSA 641:7 which provides:

641:7 Tampering with Public Records or Information. A person is guilty of a misdemeanor if he

I. knowingly makes a false entry in or false alteration of any thing belonging to, received, or kept by the government for information or record, or required by law to be kept for information of the government; or

II. presents or uses any thing knowing it to be false, and with a purpose that it be taken as a genuine part of information or records referred to in paragraph I; or

III. purposely and unlawfully destroys, conceals, removes or otherwise impairs the verity or availability of any such thing.

(2) persons appearing before the body

(3) decisions to meet in executive session

(4) brief descriptions of subject matter discussed

(5) final decisions.

e. Minutes are a permanent part of the body's records and must be recorded and open to public inspection within 144 hours of the meeting. RSA 91-A:2,II. This does not mean that stenographic or verbatim transcripts must be made. DiPietro v. City of Nashua, 109 N.H. 174 (1968). THERE ARE NO EXCEPTIONS TO THE MINUTE REQUIREMENTS FOR OPEN MEETINGS.

f. The right of the public to inspect all public records including minutes of meetings has been clarified to specifically permit the inspection and copying, after the completion of a meeting and during regular business hours, of all notes, materials, tapes or other sources used by an agency to compile the minutes of the meeting. RSA 91-A:4,I, as amended by Ch. 279:2, Laws 1983.

2. EXECUTIVE SESSIONS - RSA 91-A:3

a. In order to meet in Executive Session, a majority of the members present must vote to meet in Executive Session. The vote must be a roll call vote recorded in the minutes of the open meeting. The minutes must state whether the Executive Session is being held for deliberations or whether it falls within one of the exceptions to open meetings set forth in paragraph c.(2) below.

b. What cannot be done in Executive Sessions:

(1) Bodies cannot receive any information, evidence, or testimony of any kind or in any form in Executive Session unless one of the exceptions set forth in paragraph c.(2) below applies. Unless the subject matter falls within one of the

exceptions, you cannot receive documents or information from your staff, view films or videotapes, or listen to new tape recordings in Executive Sessions. They must be received in open session.

(2) Bodies cannot take any final or official action in Executive Sessions unless it falls within one of the exceptions set forth in paragraph c.(2) below. The phrase final or official action should be understood in relation to the body's duties. If, for instance, a subcommittee of the City Council only has the power to recommend action to the full council, then the vote on such a recommendation is final or official action and must be made in open session unless an exception applies.

(3) Only those matters stated in the motion to go into Executive Session may be discussed during the Executive Session. RSA 91-A:3,II, as amended by Ch. 83:4, Laws 1986 (Eff. January 1, 1987).

c. What may be done in Executive Session:

(1) Deliberations. This simply means discussion by and among the members of the public body about matters which are formally before them. The public body may meet in Executive Session solely for deliberations, including review of evidence received during an open meeting at any time, provided the vote and notice requirements are satisfied.

(a) If any person, other than a member of the body or agency, participates in the deliberations, the public must be admitted.

(b) If any information, evidence, or testimony is received in any form and none of the exceptions applies, the public must be admitted.

(c) Although the law does not prohibit the public body from permitting other persons (e.g. staff) simply to be present at (and not participate in) Executive Sessions held for deliberations, the better practice would be not to allow anyone other than a member of the board or commission itself (as distinguished from staff) to be present. The presence of staff during deliberations may tend to invite solicitation by members of the body of further information and evidence relative to the matter under consideration, a practice clearly prohibited in Executive Sessions held for deliberations. This is not to say that other persons (e.g. staff, legal counsel) may not attend Executive Sessions for purposes other than deliberations.

NOTE: Legislative committees, which had previously been exempt from the open meeting requirement upon a three-fifths roll call and recorded vote, may no longer receive information, evidence or testimony or take final action in Executive Session unless the matter falls within one of the exceptions listed in paragraph C.(2).

(2) <u>EXCEPTIONS</u> - RSA 91-A:3,II.

All sessions at which information, evidence or testimony in any form is received shall be open to the public unless the matter is within an exception under RSA 91-A:3,II. No ordinances, orders, rules, resolutions, regulations, contracts, appointments, or other official actions shall be finally approved in Executive Session except as provided below.

A body or agency may exclude the public only if a recorded roll call vote is taken to go into Executive Session. A motion to go into Executive Session stating which exemption under this paragraph is claimed shall be made only when the body or agency is considering or acting upon the following matters:

(a) The dismissal, promotion or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him, unless the employee affected requests an open meeting.

(b) The hiring of any person as a public employee.

(c) Matters which, if discussed in public, likely would affect adversely the reputation of any person, other than a member of the body or agency itself, unless such person requests an open meeting.[2]

(d) Consideration of the acquisition, sale or lease of property which, if discussed in public, likely would benefit a party or parties whose interests are adverse to those of the general community.

(e) Consideration or negotiation of pending claims or litigation which has been threatened in writing or

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[2] In Appeal of Plantier, 126 N.H. 500 (1985), the New Hampshire Supreme Court ruled that the New Hampshire Board of Registration in Medicine could not rely on this section to hold a closed disciplinary hearing where another, more specific, statute governing the agency entitled the physician complained against to an open hearing if he requested one.

filed against the body or agency or any subdivision thereof, or against any member thereof because of his membership in such body or agency, until the claim or litigation has been fully adjudicated or otherwise settled.

(f) Consideration of applications by the Adult Parole Board under RSA 651-A.

d. Minutes of Executive Sessions:

(1) The decision to hold an Executive Session must be included in the minutes of the open meeting.

(2) Minutes of Executive Sessions are required but to a lesser extent than for open sessions. At a minimum, Executive Session minutes must include any decisions made in Executive Session. Such decisions must be disclosed within 144 hours unless two-thirds of the members present determine that divulgence of the information would:

(a) Likely affect adversely the reputation of any person other than a member of the body or agency itself, or

(b) Render the proposed action ineffective.

The determination by two-thirds of the members present did not divulge the information is a "decision" which must be recorded together with the reasons for nondisclosure. The decision on the matter under consideration must be recorded in the minutes, although it need not be disclosed until a majority of the members determine that the circumstances set forth in (a) or (b) above no longer apply.

NOTE: The right to inspect and copy the minutes of meetings of bodies and agencies was held to apply to minutes of Executive Sessions in Orford Teachers Assoc. v. Watson, 121 N.H. 118 (1981). Although minutes of Executive Sessions need only be kept to the extent of recording any decisions made, RSA 91-A:3,III, under this decision any minutes kept of Executive Sessions are open to public disclosure as public records unless the board or agency votes to keep them confidential for a reason permitted under RSA 91-A:3,III or unless another statutory exemption from disclosure applies.

III. RECORDS

A. WHAT IS A PUBLIC RECORD?

The Right-to-Know Law does not include a definition of what constitutes a public record. In Mans v. Lebanon School Board, 112 N.H. 160 (1972), the New Hampshire Supreme Court applied a balancing test to determine whether a record was public: the benefits of disclosure to the public versus the benefit of nondisclosure to the public body. Most documents in a public body's files would be considered public records and subject to disclosure unless one of the exceptions applies.[3] If the record is a public record, the next consideration is whether any of the statutory exemptions applies.

B. STATUTORY EXEMPTIONS FROM DISCLOSURE. RSA 91-A:5

1. Records of grand and petit juries.[4]

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[3] If you question whether the document is a public record, consult your counsel.

[4] The statutory exemption from disclosure of records of grand juries was cited in State v. Purrington, 122 N.H. 458 (1982), in support of the court's holding that stenographic notes and transcripts of grand jury proceedings were not subject to disclosure.

2. Records of parole and pardon boards.

3. Personal school records of pupils. Also see 20 U.S.C. #1232F et seq. - the so-called Buckley Amendment.

4. Records pertaining to internal personnel practices; confidential, commercial, or financial information;; test questions, scoring keys, and other examination data used to administer a licensing examination, examinations for employment or academic examinations; and personnel, medical, welfare, and other files whose disclosure would constitute an invasion of privacy.

   a. The scope of these exceptions has not been fully defined by case law. While the statute exempts commercial and financial information, it is believed that the exemption may have been intended to include only commercial or financial information of a somewhat confidential nature (e.g. trade secrets) or where disclosure would constitute an invasion of privacy.

   b. NOTE: the public body must have a basis for invoking the exemption and may not simply mark a document "confidential" in an attempt to circumvent disclosure.

   c. NOTE: "invasion of privacy" will not be so broadly construed as to defeat the purpose of the Right-to-Know Law. Mans v. Lebanon School Board, 112 N.H. 160 (1972).

   d. NOTE: many agencies are subject to federal and state statutes and regulations establishing the confidentiality of certain types of information. Examples of state statutes include, but are not limited to:

      (1) Certain records of the Department of Employment Security. RSA 282-A:118.

      (2) Public assistance records. RSA 167:30.

      (3) Physician-patient communications. RSA 329:26.

(4) Certain records of the Insurance Department. RSA 400-A:25.

(5) Certain consumer protection and antitrust records of the Office of Attorney General. RSA 356:10,V and RSA 358-A:8,VI. Reference should be made to all federal and state statutes and regulations applicable to an agency or body for purposes of determining which records may be deemed confidential.

e. NOTE: RSA 91-A:4 - If disclosure of a record is otherwise prohibited by statute, the Right-to-Know Law does not compel disclosure.

5. This statutory exemption applies to bank examiners' reports. Appeal of Portsmouth Trust Co., 120 N.H. 753 (1980).

6. In 1986, the Legislature provided that a public body could release information concerning health or safety to persons whose health or safety might be affected without compromising the confidentiality of the files. RSA 91-A:5,IV as inserted by Ch. 83:6, Laws 1986, effective January 1, 1987.

C. ACCESS TO INFORMATION STORED IN COMPUTERS.

Effective January 1, 1987, the Right-to-Know Law provides that public documents stored in computers shall be available in the same manner as records stored in public files except that access to work papers, personnel data and other confidential information shall not be made available. RSA 91-A:4,V.

D. COURT-MADE EXCEPTIONS TO DISCLOSURE.

Certain law enforcement investigative files Lodge v. Knowlton, 118 N.H. 574 (1978). See section I below.

E. OTHER EXCEPTIONS TO DISCLOSURE WHICH WOULD HAVE A GOOD CHANCE OF BEING UPHELD BY A COURT.

1. Written legal advice from the agency's or body's counsel. Society for the Protection of N.H. Forests v. Water Supply and Pollution Control Commission, 115 N.H. 192 (1975).

2. Any documents or material which an agency would be permitted to receive in Executive Session to the extent disclosure of such records would frustrate the purpose for the Executive Session.[5]

3. Drafts of certain documents and certain intra-office communications. See Gordon v. Office of Legislative Services, Eq. #20-987 Merrimack County Superior Court (February 1, 1974). The reasoning behind this exclusion concerns documents which do not represent the final decision or reasoning of an agency. We do not interpret the Right-to-Know Law so as to permit the probing of the mental processes of the administrative workers. While many of such documents may be public records, we do not believe the Right-to-Know Law requires disclosure which would effectively prohibit the frank, open, and honest discussion which is so necessary to reasoned decision making. This is recognized by the Right-to-Know Law itself in its provision authorizing Executive Sessions for deliberations.

F. BURDEN OF PROOF.

In all cases, the public body bears the burden of proving that a record is not public.

G. PUBLIC INSPECTIONS. RSA 91-A:4.

1. If none of the above exemptions applies, the record is subject to public inspection. Any citizen of the State has the right to inspect all non-exempt public records during the regular business hours on the regular business premises of the public body and to make memoranda abstracts, photographic or photostatic copies of the records.

2. While the Right-to-Know Law does not require the public body to bear the cost of reproductions, we suggest that public bodies make their reproduction equipment available, if possible, at a reasonable

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[5] The reasons behind both 1. and 2. are fairly obvious. If an agency can exclude the public from certain meetings and receive legal advice or information in such a closed session, the forced public disclosure of those documents would nullify the effect of holding an Executive Session.

cost in order to comply with the spirit of the law. This does not require the public to use the public body's reproduction facilities.

3. If the public body does not have a regular office or place of business, the public records shall be kept in an office of the political subdivision in which the body is located or, in the case of a state agency, in an office designated by the Secretary of State. RSA 91-A:4,IV, inserted by Ch. 83:5, Laws 1986, effective January 1, 1987.

4. If the agency uses a photocopying machine or other device maintained for use by the agency, the agency may charge only the actual cost of providing the copy. If another fee has been established by law, that fee may be charged in lieu of actual costs. RSA 91-A:4,IV, as inserted by Ch. 83:5, effective January 1, 1987. If the agency maintains its records in a computer storage system, it may provide a printout in lieu of the original documents, provided that the agency has the capacity to produce the information in a manner that does not reveal confidential information.

5. A citizen does not have to have any reason or any need to inspect the documents. If a record is public, it must be disclosed regardless of the motive for the request or the intended use of the information.

6. Whenever access to public records is requested, the agency must make a diligent effort to produce the record. An agency is not required to create a record where one does not exist. If public information is requested in a format which does not exist, the agency is not required to create that format.

7. If the requested records are not immediately available, the agency is required to, within five business days, make the record available, deny the request in writing with reasons, or furnish a written acknowledgement of the request and a statement of the time reasonably necessary to determine whether the request shall be granted or denied. RSA 91-A:4,IV, as inserted by Ch. 83:5, Laws 1986, effective January 1, 1987.

8. If a public document is unavailable for a limited time because of its removal for use by a government official in discharging his official duties, this is not a violation of the requirement that public documents be available for inspection and copying. Gallagher v. Town of Windham, 121 N.H. 156 (1981). The court in this case also confirmed that, although all public documents must be available for inspection and copying, the public body is not absolutely mandated to provide copies at its labor and expense. Public officials were cautioned, however, to assist citizens in obtaining copies whenever it is reasonable to do so. Carbonneau v. Town of Rye, 120 N.H. 96 (1980).

H. RECORDS REQUIRED TO BE DISCLOSED BY COURT DECISION

1. Individual salaries and employment contracts of local school teachers. Mans v. Lebanon School Board, 112 N.H. 160 (1972).

2. Names and addresses of striking teachers. Timberlane Regional Education Assn. v. Crompton, 114 N.H. 315 (1974).

3. Certain law enforcement investigative records. Lodge v. Knowlton, 118 N.H. 574 (1978) (This is discussed in more detail below.)

4. A computerized tape of field record cards concerning property tax information. Menge v. City of Manchester, 113 N.H. 533 (1973).

5. At least one superior court has held that the names and addresses of school children and their parents are public records. Daniell v. Pouliot, Eq. #78-459, Merrimack County Superior Court (May 18, 1978).

I. LAW ENFORCEMENT INVESTIGATIVE FILES

In the 1973 memorandum issued by the Attorney General's Office, it was stated that police investigative records were not public and therefore not subject to public inspection. However, since the New Hampshire Supreme Court's decision in Lodge v. Knowlton, 118 N.H. 574 (1978), that statement must be limited in scope. In the absence of legislative

clarification, the Court in Lodge adopted part of the Federal Freedom of Information Act, 5 U.S.C. 552(b)(7), as the standard for the disclosure or nondisclosure of investigative records.

If the records requested are (1) investigative records and (2) compiled for law enforcement purposes, they may be withheld if the law enforcement agency can prove that disclosure would either:[6]

(a) Interfere with enforcement proceedings; or

(b) Deprive a person of a right to a fair trial or an impartial adjudication; or

(c) Constitute an unwarranted invasion of privacy (NOTE: The statutory exemption for invasion of privacy will be strictly construed, Mans v. Lebanon School Board, 112 N.H. 160 (1972)); or

(d) Reveal the identity of a confidential source, and in the case of a record compiled by a law enforcement authority in the course of a criminal investigation or by any agency conducting a lawful national security investigation, confidential information furnished only by a confidential source; or

(e) Reveal investigative techniques and procedures; or

(f) Endanger the life or physical safety of law enforcement personnel.

THE BURDEN OF PROOF IS ON THE LAW ENFORCEMENT AGENCY TO SHOW THAT THE RECORD IS EXEMPT. IT IS NOT THE RESPONSIBILITY OF THE PERSON REQUESTING THE RECORD TO SHOW THAT NO EXEMPTION APPLIES.

Any request for the production of investigative records should be considered in light of all the relevant facts and

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[6] If none of the Lodge exemptions applies to a particular record, one of the regular exemptions in the Right-to-Know Law set forth in Section III,B. and D. of this memorandum may still apply. Reference should also be made to the State Security and Privacy Plan for disclosure of criminal history record information (CHRI).

circumstances. There is no test to apply in every instance to determine which documents may be withheld and which must be disclosed. However, in order to provide law enforcement with some assistance in resolving such requests, additional guidance follows:

1. INTERFERENCE WITH LAW ENFORCEMENT PROCEEDINGS

The proceedings do not have to be pending, but there should be a reasonable likelihood of adjudicatory proceedings at some point in the future. We would construe this to include unresolved crimes where some regular effort continues to be expended to solve it.

This exemption would not justify, for instance, withholding investigative records concerning an unquestioned suicide, although other exceptions might apply; for example, the report may include facts whose disclosure would constitute an invasion of privacy.

2. ACCUSED'S RIGHT TO FAIR TRIAL

This exemption probably would apply in all pretrial situations. Information which might prejudice an accused's right to a fair trial include records relating to the following:

a. The guilt or innocence of a defendant;

b. The character or reputation of a suspect;

c. Examinations or tests which the defendant may have taken or have refused to take;

d. Gratuitous references to a defendant; for example, reference to the defendant as "a dope peddler;"

e. The existence of a confession, admission or statement by an accused person, or the absence of such;

f. The possibility of a plea of guilty to the offense charged or a lesser offense;

g. The identity, credibility or testimony of prospective witnesses;

g. Names of witnesses and information provided by them who cooperated by providing information to authorities.[7]

h. Names of subjects of investigation.

4. CONFIDENTIAL SOURCE

This relates to the informant situation and will probably cover express or implied assurances of confidentiality.

5. INVESTIGATIVE TECHNIQUES AND PROCEDURES

This exclusion should not be interpreted so as to include routine techniques and procedures already well known to the public but should cover techniques and procedures not commonly known.[8]

6. ENDANGERING LIFE OR PHYSICAL SAFETY OF LAW ENFORCEMENT PERSONNEL

This exclusion has not been widely construed but appears fairly straightforward and understandable.

Any investigative record, whether open, closed, active, or inactive may fall within the exemptions. For instance, the disclosure of an open or active file could interfere with enforcement proceedings in many ways: apprehending a suspect, disclosing trial strategy, etc. Disclosure of a closed file would not be likely to interfere with enforcement proceedings but might constitute an unwarranted invasion of privacy or make public the name of a confidential informant. If only a portion of the record is exempt, the remaining portion must be disclosed if it is reasonably segregable from the non-exempt portions.

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[7] The reasoning behind this exclusion is best stated in Forrester v. U.S. Dept. of Labor, 433 F.Supp. 987 (S.D.N.Y. 1977), "... public policy requires that individuals may furnish investigative information to the government with complete candor and without the understandable tendency to hedge or withhold information out of fear that their names and the information they provide will later be open to the public." Such disclosure might have a "chilling effect on sources." Id; see also Tarno Pol v. FBI, 442 F.Supp. 5 (D.C.D.C. 1977); Ferguson v. Kelly, 448 F.Supp. 919 (N.D. Ill., 1977).

[8] See Ferguson v. Kelly, 448 F.Supp. 919, 922 (N.D. Ill., 1977).

h. Any information of a purely speculative nature;

i. Any opinion as to the merits of the case or the evidence in the case.

3. UNWARRANTED INVASION OF PRIVACY.

In determining whether disclosure of documents will constitute an unwarranted invasion of privacy, we expect the court will balance the public and/or private interest in the information sought against the severity of the invasion of privacy. If the public body asserts this exemption in good faith, the individual requesting the information will have to provide a reason or need for the information, contrary to most Right-to-Know Law situations. Although the federal courts are in some disagreement, there is substantial authority to support the nondisclosure of the types of information listed below on the grounds that their disclosure constitutes an unwarranted invasion of privacy, which is another way of saying an invasion of privacy without justification or adequate reason. Remember that these are not blanket exceptions. The facts and circumstances of each situation must be carefully examined to determine whether the privacy exception will apply. Information regarding the following matters may be exempt under this section:

a. Marital status

b. Legitimacy of children

c. Medical conditions

d. Welfare payments

e. Alcoholic consumption

f. Family fights

Many of the exemptions for law enforcement investigative records have not been interpreted yet by the New Hampshire courts. It is possible the above guidance based on federal case law may be rejected by our courts. It is hoped that such will not be the case, since the needs, demands, and results of good law enforcement are complex and long lasting. It is important, therefore, that these exemptions be applied thoughtfully and carefully. The mere assertion of an exclusion without adequate reason or justification will not be sufficient to sustain a law enforcement agency's denial of a request for information under the Right-to-Know Law.

IV. REMEDIES

The importance of compliance with the provisions of the Right-to-Know Law is demonstrated by the remedies which the legislature and courts have made available to anyone who contests a public body's noncompliance.

A. INJUNCTIVE RELIEF - RSA 91-A:7

1. A petition for injunction may be filed with any clerk or justice of the superior court.

2. Ex parte relief may be granted when time is of the essence.

3. Such relief may enjoin the body or agency from violating the Right-to-Know Law with regard to future actions subject to its provisions. RSA 91-A:8.

4. The petition need only state facts constituting a violation of the Right-to-Know Law and need not be a masterpiece of legal draftsmanship. RSA 91-A:7.

B. Effective January 1, 1987, RSA 91-A:8 provides that a body, agency or person violating the Right-to-Know Law shall be liable for attorneys' fees and costs incurred in a lawsuit under RSA 91-A if the court finds (1) that the lawsuit was necessary in order to make the information available or the proceeding open and (2) that the body, agency or person knew or should have known that the conduct engaged in was a violation. No fees shall be awarded if the parties have agreed that fees shall not be paid. If an officer, employee or other official has acted in bad faith, the fees may be

awarded personally against him. The holdings of Carter v. Nashua, 113 N.H. 407 (1973) and Stoneman v. Tamworth School District, 114 N.H. 371 (1974) that a court, in appropriate cases, may invalidate an action taken at a meeting held in violation of the Right-to-Know Law, have now been codified in the statute. RSA 91-A:8,II, as inserted by Ch. 83:7, Laws 1986.

C. Whenever the public body is in doubt as to whether a document is a public record, a court hearing a petition under the Right-to-Know Law may conduct an in camera (in chambers) inspection to determine whether all or part of the document should be disclosed.

D. No cases have yet addressed the issue of the liability of agencies subject to the Right-to-Know Law for damages caused by violations of its provisions. While state agencies ordinarily are protected by the doctrine of sovereign immunity, now limited by RSA Chapter 541-B, members of public bodies acting maliciously and beyond the scope of their authority may face personal liability.